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### Due Process

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## FOURTH DEPARTMENT

People v. Swan<sup>337</sup>

(decided June 22, 1990)

The defendant, convicted of first degree murder, first degree attempted murder, first degree attempted manslaughter, and two counts of first degree criminal use of a firearm contended, *inter alia*,<sup>338</sup> that his enhanced sentence upon reconviction violated his due process rights guaranteed by the state constitution.<sup>339</sup> The court held that the defendant's procedural due process rights were not violated by the enhanced sentence.<sup>340</sup>

During the initial trial, a jury found the defendant guilty of murdering a New York State trooper and attempting to murder another. After the defendant was convicted, the trial judge imposed an indeterminate prison sentence aggregating thirty-five years. The defendant successfully appealed his conviction on the grounds that the trial judge denied his state constitutional right to waive a jury trial<sup>341</sup> and denied him a fair trial by failing to

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337. 158 A.D.2d 158, 557 N.Y.S.2d 791 (4th Dep't), *appeal denied*, 76 N.Y.2d 991, 565 N.E.2d 529, 563 N.Y.S.2d 780 (1990).

338. *Id.* at 160, 557 N.Y.S.2d at 792. The defendant also contended that he was denied a fair trial because: 1) he was indicted before an improper grand jury; 2) the trial court failed to order a competency hearing; 3) the prosecution's witness made a reference to a notorious would-be assassin; 4) the prosecutor's cross-examination of the defendant's psychiatrist was improper; 5) the jury was informed about the trial court's denial of defendant's motion to dismiss on the grounds of insufficient evidence; and 6) a statement he made while at a hospital was improperly admitted into evidence. *Id.* at 160-62, 557 N.Y.S.2d at 792-94.

339. N.Y. CONST. art. I, § 6.

340. *Swan*, 158 A.D.2d at 163, 557 N.Y.S.2d at 794.

341. *See* *People v. Swan*, 130 A.D.2d 6, 8, 519 N.Y.S.2d 581, 582 (4th Dep't 1987) (citing *People v. Davis*, 49 N.Y.2d 114, 400 N.E.2d 313, 424 N.Y.S.2d 372 (1979); *People v. Duchin*, 12 N.Y.2d 351, 190 N.E.2d 17, 239 N.Y.S.2d 670 (1963); N.Y. CONST. art. I, § 2).

Article I, section 2 provides, in pertinent part:

A jury trial may be waived by the defendant in all criminal cases, except those in which the crime charged may be punishable by death, by a written instrument signed by the defendant in person in open court before and with the approval of a judge or justice of a court having

question the jury about possible prejudice regarding a prolonged delay of trial.<sup>342</sup>

Upon retrial before a different judge, the defendant was again convicted of the same charges. This trial judge, however, increased the defendant's sentence to forty-two years. The reason for the increase was that the original trial judge incorrectly sentenced the defendant to an indeterminate term of imprisonment of five to fifteen years for attempted murder. The correct sentence for such an offense, according to the second trial judge, was a minimum of fifteen years to life imprisonment.<sup>343</sup> In its opinion, the court ruled that *People v. Van Pelt*,<sup>344</sup> which created a presumption of institutional vindictiveness and therefore called for the second trial judge to articulate a cognizable reason for imposing an enhanced sentence, was inapplicable under the circumstances of the defendant's resentencing. The court found that since the enhanced sentencing following retrial and conviction was invalid, the defendant "received the sentence he should have received following his original conviction."<sup>345</sup> Accordingly, *Van Pelt* was inapplicable because the second trial judge was merely correcting the illegal and improper sentence imposed by the first trial judge and not imposing a harsher sentence based on information learned subsequent to the defendant's first conviction.

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jurisdiction to try the offense.

N.Y. CONST. art. I, § 2.

342. *Swan*, 130 A.D.2d at 10, 519 N.Y.S.2d at 583.

343. *Swan*, 158 A.D.2d at 162-63, 557 N.Y.S.2d at 794 (citing N.Y. PENAL LAW § 70.00(2)(a), (3)(a)(i) (McKinney 1987)).

344. 76 N.Y.2d 156, 556 N.E.2d 423, 556 N.Y.S.2d 984 (1990).

345. *Swan*, 158 A.D.2d at 163, 557 N.Y.S.2d at 794.